



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1445 OF 2012

(Before Hon. Justice Mathews N. Nduma)

PATRICK OMUTIA OTULIA.....1ST CLAIMANT

GRACE NJERI NZOMO.....2ND CLAIMANT

VERSUS

ATHI WATER SERVICES BOARD.....RESPONDENT

J U D G E M E N T

1. Claimants were employees of Nairobi City Water & Services Company Limited. They were employed on five (5) year contracts effective 17th May, 2007.
2. The Respondent by a letter dated 19th May, 2010 purported to have taken over the operations of the Nairobi City Water & Services Company Limited by dint of section 53 of the Water Act 2002.
3. By the same letter the Respondent sent the 1st Claimant on compulsory leave and was asked to hand over his office immediately which he proceeded to do.
4. The 1st Claimant was Director Finance. The 2nd Claimant was Director Legal Company Secretary and Security Services and was similarly sent on compulsory leave by the Respondent by a letter dated 26th May, 2010.
5. The efforts by the Claimant to be reinstated to work failed and were effectively separated from work.
6. The claimants allege that the Respondent –
 - (i) Had no legal capacity to remove them from work.
 - (ii) That, even if it had authority to do so, the manner of removal lacked substantive and procedural fairness.
7. The Claimants pray for –
 - a) Exemplary and general damages based on the amount they earned in their five (5) years contract, in respect of which, the claimants had reasonable expectation of renewal for a further two five (5) year terms.
 - b) Any other or further relief that the court may wish to grant.
 - c) Costs of the suit.
8. It is common cause that the Claimants, were fully paid remuneration for the entire five (5) year term they each served. This is the reason, they seek damages for contemplated renewal of contract. They do not seek damages in respect of the contracts they did not fully serve but were paid fully in respect thereof.
9. The Claimants were also paid gratuity calculated at 31% of the basic monthly salary in respect of the served contracts. No claim is therefore made by the Claimants in respect of any terminal benefits arising from the contract that they had served fully.

10. Both Claimants were remaining about ten (10) years each before attaining formal retirement age at sixty (60) years. They claim that they lost future earnings and that their careers were dented by being placed on compulsory leave for the remainder of the five (5) year term and loss of opportunity to have the contract renewed for a further two (five year) terms hence the damages sought.

11. The 2nd claimant died, and limited grant of letters of administration AD litem was granted to Peter Gachie Karogi by the High Court on 8th June, 2016. The 2nd Claimant was thus substituted by the said Peter Gachie Karogi upon application by counsel for the Claimants.

Response

12. The Respondents filed a Memorandum of Response on 27th December, 2013 in which they state that the Claimants were suspended in public interest to facilitate taking over of the operations of the Nairobi City Water & Sewerage Company. The Respondents did not call any witness in support of their case.

13. It is common cause that the 1st Claimant earned Kshs.643,374.35 per month excluding fringe benefits.

14. The 2nd Claimant earned Kshs.565,826 per month excluding fringe benefits.

15. The Respondent deny that there was any employer-employee relationship between the respondent and the Claimants and submits that this court has no jurisdiction to hear and determine this matter.

16. The Respondent prays that the suit be dismissed with costs.

Determination

17. The issues for determination are –

(i) Whether the court has jurisdiction to determine this suit.

(ii) Whether the sending on compulsory leave and eventual separation of the Claimants from the Respondents was substantively and procedurally, lawful.

(iii) Whether the Claimants are entitled to the reliefs sought.

Issue I

18. The facts of this case show that the Claimants were employed by Nairobi Water & Sewerage Company Limited (NWSC). It is also undeniable that the operations of the NWSC were taken over by the Respondent Company and the Respondent proceeded to send the Claimants on compulsory leave.

19. Section 12 of the Employment and Labour Relations Court Act, confers jurisdiction on this court to hear and determine inter alia, disputes, relating to or arising out of employment between an employer and an employee.

20. The Respondent assumed the control of the services rendered by the Claimants and in that capacity, sent the Claimants on compulsory leave. The Respondent continued to pay the salary of the Claimants until their respective contract expired.

21. Clearly, the Respondents became the employer of the Claimants and they equally became the employees of the Respondent notwithstanding the fact that the written contracts of employment were between the previous employer, NWSC and the Claimants. This take over was by operation of the law, and was effected. Whether or not that take over was in accordance with the law is a moot question between the two limited companies not before this court.

22. The court finds that it has jurisdiction to hear and determine the dispute arising out of the employment relationship between the Claimants and the Respondent.

Issue II

23. The second question for determination is whether the sending on compulsory leave of the Claimants by the Respondent without a notice to show cause and any disciplinary process before or after the event was lawful and fair.

24. This question is answered in the negative for the simple reason that the pleading, and testimony by the Claimants that they were sent home without any due process being followed was not rebutted by the Respondent. Documentary evidence show clearly that the two were sent on compulsory leave without notice, notice to show cause, disciplinary hearing or any valid reason given by the Respondent to the Claimants.

25. The Respondents were denied opportunity to work for the remaining period of the contract unlawfully, and unfairly contrary to sections 41, 43, and 45 of the Employment Act, 2007 and the court finds so.

Issue III

26. The 3rd issue for determination is whether the Claimants are entitled to exemplary and general damages based on the monthly salary the respective Claimant earned at the time of separation.

27. The Claimants were paid their full salary until their five year contracts expired. The Claimants were however put to ridicule, pain and suffering by being kept away from employment on compulsory leave without any opportunity to explain why their employment ought not to be terminated.

28. The conduct by the Respondent amounted to constructive dismissal and the Claimants were entitled to repudiate the contracts and claim damages. However, the Claimants did not repudiate the existing contracts, but continued to receive salary for no work done until the five (5) year contract expired.

29. The Claimants did not also plead any claim for constructive dismissal but seek exemplary and general damages for non-renewal of their contracts due to the conduct by the Respondent. In short, the employment of the Claimants was by effluxion of time and are not entitled to compensation for anticipated renewal of contract.

30. Accordingly, the court finds, even though the conduct by the Respondent to send the Claimants on leave was substantively and procedurally unfair, the Respondent mitigated its conduct and the loss and damages occasioned the claimants by paying them full salary for the remainder of the five (5) year contract, even though they did not provide any services to the Respondent during that period.

31. The contract of the Claimants expired on 16th July, 2012. The two were paid salaries without any work for a period of twenty two (22) months.

32. The Claimants did not plead particulars of loss and damage suffered by them during the 22 months period. The court is entitled to assume that they were satisfied by the remuneration they continued to receive, even though without work.

33. It is trite law that the court cannot grant that which has not been pleaded.

34. The court having found that no damages are payable in respect of prospective contracts, grants non to Claimants. However the finding by the court that the conduct of the Respondent was substantively and procedurally unfair entitles the Claimants to costs of the suit.

Dated and Signed in Kisumu this 13th day of February, 2018

MATHEWS N. NDUMA

Judge

Delivered and signed in Nairobi this 2nd day of March, 2018

MAUREEN ONYANGO

Judge

Appearances

Nyabena Nyakundi & Co. for Claimant

Kipkenda for Respondent

Anne Njung'e – Court Clerk